

**Mac Plastics, Inc. and Industrial Trade Union,
Local 231, International Union of Allied Novelties and Production Workers, AFL-CIO.**
Case 29-CA-17373

June 28, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

Upon a charge filed by Industrial Trade Union, Local 231, International Union of Allied Novelties and Production Workers, AFL-CIO (the Union) on May 26, 1993, the General Counsel of the National Labor Relations Board issued a complaint on July 9, 1993, against Mac Plastics, Inc., the Respondent, alleging that it violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the Union's Industrial Trade Union Trust Fund (fund).

The Respondent's answer to the complaint admits all material factual allegations in the complaint¹ and asserts an affirmative defense.

On March 14, 1994, the General Counsel filed a Motion for Summary Judgment. On March 15, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

The Respondent's admissions to the factual allegations in the complaint as amended establish (1) that at all material times, the Union was the recognized and exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit composed of all the nonsupervisory employees, including regular part-time employees working more than 20 hours per week, employed by the Respondent at its Babylon, New York facility, excluding office clerical employees, toolroom employees, and guards; (2) that by the terms of its most recent collective-bargaining agreement which was effective April 8, 1990, to April 7, 1993, the Respondent was required to make periodic payments on behalf of the unit employees to the fund in order to provide medical benefits for the employees;

¹ The Respondent in its answer states that its office and principal place of business is located in Babylon, New York, rather than in Mineola, New York, as alleged in the complaint. The General Counsel has moved to amend the complaint to reflect that the Respondent's facility is located in Babylon, New York. We grant the General Counsel's motion and have also modified the unit description accordingly.

and (3) that since on or about December 5, 1992, the Respondent has unilaterally failed to make contributions to the fund.

The Respondent raises the affirmative defense that it lacks the financial ability to make the required payments. Such a claim of economic necessity, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement. *Tammy Sportswear Corp.*, 302 NLRB 860 (1991). Further, payments to health and welfare and pension funds required by a collective-bargaining agreement constitute a term and condition of employment which survives the expiration of the contract.² Therefore, even after the collective-bargaining agreement expired on April 7, 1993, the Respondent could not unilaterally discontinue payment to the fund without negotiating this change with the Union.

Thus, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint and has not raised an adequate defense to the complaint's allegation.

Because we find the affirmative defense submitted by the Respondent to be inadequate, and because there are no material facts in dispute, in the absence of any cause to the contrary having been shown by the Respondent, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation with its principal place of business in Babylon, New York, is engaged in the manufacture and wholesale distribution of injected plastic molds and related products. During the 12 months preceding the issuance of the complaint, which period is representative of its operations annually, in the course and conduct of its business operations, the Respondent sold and shipped from its Babylon, New York facility products valued in excess of \$50,000 directly to firms located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

² See, e.g., *Rappazzo Electric Co.*, 281 NLRB 471, 481-482 (1986).

All employees, including regular part-time employees working more than twenty (20) hours per week employed by Respondent at its Babylon, New York, facility, excluding office clerical employees, toolroom employees, and supervisors and guards as defined in the Act.³

At all material times the Union has been the designated exclusive collective-bargaining representative of the employees in the unit and has been recognized as such by the Respondent. Recognition has been embodied in a series of collective-bargaining agreements, the most recent of which was effective by its terms for the period from April 8, 1990, to April 7, 1993. By virtue of Section 9(a) of the Act, the Union has been, and is now, the exclusive representative of the employees in the bargaining unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The parties' collective-bargaining agreement contains a provision requiring the Respondent to make periodic payments on behalf of the employees in the unit described above to the Union's Industrial Trade Union Trust Fund in order to provide medical benefits for unit employees. This provision is a mandatory subject of bargaining. Since about December 5, 1992, the Respondent has unilaterally failed to make contributions to the fund. By such acts and conduct, the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

CONCLUSION OF LAW

By unilaterally failing to make contributions to the fund since about December 5, 1992, the Respondent has failed and refused to bargain collectively, and is failing and refusing to bargain collectively, with the representative of its employees, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make whole the Industrial Trade Union, Local 231, International Union of Allied Novelties and Production Workers, AFL-CIO's Industrial Trade Union Trust Fund for all contributions that would have been paid but for the Re-

spondent's unlawful discontinuance of payments⁴ and to make unit employees whole for any losses ensuing from the failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Mac Plastics, Inc., Babylon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Industrial Trade Union, Local 231, International Union of Allied Novelties and Production Workers, AFL-CIO by unilaterally failing and refusing to make required payments to the Union's Industrial Trade Union Trust Fund.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contributions to the fund that have not been paid and that would have been paid in the absence of the Respondent's unlawful discontinuance of the payments, and make unit employees whole in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payment due under the terms of this Order.

(c) Post at its facility in Babylon, New York, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Re-

⁴ Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into the fund in order to satisfy our "make-whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³ As noted above, we have modified the unit description to state that the facility is in Babylon rather than Mineola, New York.

spondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Industrial Trade Union, Local 231, International Union of Allied Novelties and Production Workers, AFL-CIO by unilaterally failing and refusing to make required payments to the Union's Industrial Trade Union Trust Fund.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contributions to the fund that have not been paid and that would have been paid in the absence of our unlawful discontinuance of the payments, and make unit employees whole, with interest.

MAC PLASTICS, INC.